In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1405

JEFFERSON T. BAKER, PETITIONER

v.

HOWARD H. CALLAWAY, SECRETARY OF THE ARMY OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In 1934, petitioner was discharged from his commission as first lieutenant in the Infantry Reserve of the Army of the United States "under circumstances other than honorable" (Pet. App. 40), after a Board of Officers concluded that he "did perpetrate a fraud and deception upon the people of the State of Texas" (Pet. App. 37) by legally changing his name to further his political ambitions (Pet. App. 39, 48). Petitioner commenced this action in August 1972, seeking to set aside his discharge and have his military records corrected, or, alternatively, to compel the Army to grant him an honorable discharge (Pet. 6). At no time since his discharge in 1934 has petitioner applied to the Army Board for Correction of Military Records for relief (Pet. 6, 7; Pet. App. 49), pursuant to 10 U.S.C. 1552.[1]

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[1]Petitioner did seek relief at lower administrative levels. He applied in 1944 to the Discharge Review Board of the Secretary of War for correction of his discharge (Pet. 5; Pet. App. 41)

The district court granted the government's motion to dismiss the complaint "for the reason that the Plaintiff has failed to exhaust his administrative remedies" (Pet. App. 36). The court of appeals, concluding that "[t]he trial court correctly held that the plaintiff was not entitled to relief because he had failed to exhaust the administrative remedies available to him under 10 U.S.C. §§ 1552-53 (1970)," affirmed (Pet. App. 15), and denied rehearing (Pet. App. 16).

Since the decision of the court of appeals is correct, and there is no conflict of decisions, further review by this Court is not warranted.

1. As this Court has written, "[t]he basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi* v. *Davidson,* 405 U.S. 34, 37. This doctrine, which must be applied in each case with an "understanding of its purposes and of the particular administrative scheme involved" (*McKart* v. *United States,* 395 U.S. 185, 193), has been applied by the courts to require that persons seeking to correct their military records or to challenge their discharge from military service must first exhaust the administrative remedies available to them, such as review under 10 U.S.C. 1552 through the appropriate

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and was denied relief by that Board in 1945 (Pet. App. 42-43). He requested reconsideration by the Discharge Review Board in 1960 (Pet. App. 44-45), but chose not to seek rehearing of his case (Pet. 5), although he was advised in writing that he did not have to present any new evidence in order to apply for such a rehearing (Pet. 46-47).

The Army Board for Correction of Military Records will not consider a discharge until after the individual has applied to the Discharge Review Board. See 32 C.F.R. 581.3(c)(3).

Board for Correction of Military Records. See, *e.g.*, *Sohm* v. *Fowler*, 365 F. 2d 915 (C.A.D.C.); *McCurdy* v. *Zuckert*, 359 F. 2d 491 (C.A. 5); *Schwartz* v. *Covington*, 341 F. 2d 537 (C.A. 9); *Reed* v. *Franke*, 297 F. 2d 17, 27 (C.A. 4). See also *United States* v. *Augenblick*, 393 U.S. 348, 349. Since petitioner admits that he has never sought relief from the Army Board for Correction of Military Records (Pet. 6, 7), and the Board is capable of granting him full relief, he has failed to exhaust his administrative remedies.

2. Petitioner attempts to find support for his position in the fact that an individual seeking a conscientious objector discharge is not required to present his claim to the Correction Board prior to judicial review. See *Parisi* v. *Davidson, supra,* 405 U.S. at 38, n. 3. That rule, however, was based upon a unique procedure established by the Department of the Army, detailed in Army Regulation 635-20, to be followed by a serviceman who seeks classification as a conscientious objector on the basis of beliefs that developed after entry into the service. That procedure was the exclusive administrative remedy for servicemen seeking such relief, and with respect to this particular type of relief, compliance with Army Regulation 635-20, rather than an appeal to the Army Board for Correction of Military Records, was held to mark the point at which administrative remedies have been exhausted. Department of Justice Memo. No. 652 (October 23, 1969); see *Parisi* v. *Davidson, supra.* Since an individual who has followed the procedures of Army Regulation 635-20 has exhausted his administrative remedy in conscientious objector cases, resort to the appropriate Board for Correction of Military Records is not a precondition to judicial review *in such cases.*

Petitioner, however, makes no claim of conscientious objection. Rather, he claims that he is entitled to correction of his military records because the regulation pursuant to which he was discharged is allegedly unconstitutional (Pet. 11-13).[2] Accordingly, petitioner's reliance on *Parisi* is misplaced. He has an adequate administrative remedy which he has failed to exhaust, and the courts below therefore correctly determined that he is barred from judicial review.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

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[2]Neither court below addressed the merits of the constitutional claims made in the petition concerning the validity of petitioner's discharge (Pet. 11-14). Because the merits are not properly before the Court at this time, there is no need to hold the petition pending the decision in *Secretary of the Navy* v. *Avrech,* No. 72-1713, probable jurisdiction noted October 9, 1973, argued February 20, 1974.

[3]It would appear that, in any event, the relief petitioner seeks would be barred on the ground of laches, in view of his repeated failures to pursue his claim.